



June 9, 2017

Commission's Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Dear Commission's Secretary,

Please accept these comments on behalf of American Bird Conservancy regarding the application of the National Environmental Policy Act (NEPA) and other federal environmental laws to communication towers. The FCC is seeking comment on whether licensing and registering towers is a federal action that creates a federal nexus for NEPA, Endangered Species Act, and Migratory Bird Treaty Act.

This Rule Making has the potential to eliminate the FCC's existing requirement to consider the environment in communication tower development. Without NEPA, the public loses their ability to comment to the FCC on proposed locations of communication towers, or ask that the environmental risks from those communication towers to migratory birds be minimized by adopting lighting that can reduce bird mortality by as much as 70%.

American Bird Conservancy is opposed to any new rulemaking that would weaken agency recommendations regarding the use of bird-safe lighting or that exempt siting decisions from NEPA. It is essential that progress to update lighting on tall towers to reduce mortality of migratory birds continue.

Each year, approximately seven million of our ecologically and economically-important birds collide with communication towers in North America. These collisions are primarily caused by steady-burning lights used on towers to warn aircraft of their presence. Unfortunately, these lights also attract and disorient birds during the night.

Although tower collisions threaten all birds—especially when skies are overcast or foggy—they pose a special danger to songbirds migrating at night, some of which are threatened or endangered. Making matters worse, the number of communication towers in the U.S. is expected to continue growing in coming years.

New policies put in place by the Federal Communications Commission (FCC) and Federal Aviation Administration (FAA) encourage tower operators to adopt modern, bird-friendly,

energy-saving lighting systems. A simple switch to flashing red or white lights saves birds and electricity, and still alerts pilots to the towers' presence. As of today, 723 tall towers nationwide (about five percent of the total) have already updated their lighting systems under the new guidelines. Making the switch reduces bird collisions by approximately 70 percent, and in the process saves energy and reduces operating costs.

We are seeing progress and thank the operators of the 700-plus towers that have voluntarily switched their lighting to help reduce mortality of birds attracted to the tower lights. But, there are still over fifteen thousand tall towers across the U.S. with outdated lights that are dangerous for birds. We are asking all tower operators to make this cost- and life-saving switch to help migratory birds.

For more than 50 years, researchers have been documenting how migratory birds collide with communication towers. Evidence suggests that these birds, primarily songbirds migrating at night, are either drawn to or disoriented by steady-burning lighting systems on communication towers, especially when night skies are overcast or foggy.

Birds are not as likely to be attracted to and collide with towers that are lit with only red flashing lights or white flashing lights. The new guidelines explain how owners of towers built before 2015 can use a fast and efficient series of easy steps to extinguish non-flashing lights.

Beyond the benefit to birds, tower owners stand to gain from the switch. They have a substantial economic incentive to remove non-flashing lights. Using flashing lights greatly reduces electricity consumption and costs, as well as tower maintenance costs such as the labor and cost of changing bulbs. No tower climbers or fees are required to make the switch.

The FAA is actively encouraging owners of existing towers to extinguish non-flashing lights on all towers as soon as possible. "New tower lighting schemes should now follow the revised guidance, and operators of towers with the old lighting system should submit plans explaining how and when they will transition to the new standards," the agency said in a [news release](#).

The history of the new guidelines dates back to December 2011, when the FCC agreed on interim changes to their system for approving applications for new telecommunication towers. These changes came about because of a successful lawsuit by American Bird Conservancy. That case resulted in a federal court of appeals ordering the Commission to carefully evaluate the potential adverse effects of communications towers on migratory bird populations in the Gulf Coast region during their tower licensing process. (The full ruling can be found at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-181A1.pdf.)

In May 2012, the FAA published a report documenting that extinguishing nighttime non-flashing lights on communication towers would still maintain safety for aviators. This report led to the revised [FAA Advisory Circular \(AC 70/7460-1L\)](#), which requires all new towers taller than 350 ft. above ground level approved after Dec. 4, 2015 to use only flashing lights at night and towers 150-350 ft. above ground level to use only flashing lights after Sept 16, 2016.

Unlike steady-burning lights, flashing lights pose little danger to birds. In fact, their use can reduce nighttime bird fatalities by as much as 70 percent. And that is not the only benefit of using flashing light systems. The elimination of steady-burning lights greatly reduces operation and maintenance costs for tower operators, and the change can be made inexpensively and reduces energy use.

Not all communications towers pose equal threats to birds, and basic changes to the most dangerous towers can greatly reduce tower collisions and bird deaths. Those most in need of improvements include:

- Towers with steady-burning nighttime lights: these lights attract and disorient birds, leading to collisions and bird fatalities. Red lights in particular are dangerous for birds.
- Towers 350 feet and taller cause significantly more avian fatalities than shorter ones. Likewise, towers supported by guy wires are responsible for more collisions than self-supporting ones.
- Towers located in areas with high migratory bird concentrations. This is particularly important in areas used by rare birds.
- Towers located in areas with frequent fog in the spring and fall; foggy conditions tend to increase bird collisions.

The FAA has found that flashing lights on communication towers do not pose a safety danger for aviators. Accordingly, the agency released an Advisory Circular requiring that new towers greater than 150 feet tall be lit with flashing lights. Unfortunately, existing towers are still allowed to use non-flashing lights.

Everyone has something to gain by replacing steady-burning lights with flashing ones. And the tower industry has generally been supportive of this option, recognizing that flashing lights reduce operating and maintenance costs. The win-win aspect of this opportunity is an important point to emphasize when interacting with the communication tower officials.

The communication tower industry has played an active role in reducing bird fatalities by replacing steady-burning lights with flashing ones. Tower operators and engineers can learn more about specific actions they can take to protect birds by consulting the Federal Communications Commission's 2017 report, "[Opportunities to Reduce Bird Collisions with Communications Towers While Reducing Tower Lighting Costs.](#)"

Currently, FCC's has determined that building, registering, and licensing a communication tower are federal agency undertakings/actions and therefore subject to NEPA review. ABC agrees.

Projects or programs that are financed, assisted, conducted, regulated, or approved by Federal agencies are considered major Federal undertakings or actions. According to the Council on Environmental Quality (CEQ), federal actions include "the approval of specific projects, such as construction or management activities located in a defined geographic area."

Communication towers are typically financed, regulated, and/or licensed by the FCC or other federal agencies. Sections 301 and 319 of the Communications Act provides the Federal government with the authority to require a license for transmitting radio signals over all channels. The FCC requires that many towers, including those considered a risk to aircraft safety, be registered in the FCC's Antenna Structure Registration (ASR) database. This registration reduces the risk to aircraft.

Industry claims that environmental review slows deployment of broadband and that projects take years to be approved are unfounded. The average time it takes for a tower application to move through the FCC environmental system is 45 days. While some towers can take longer to be approved, most towers are categorically excluded and those that do require FCC review are completed on average within 45 days.

For the last 43 years the FCC has considered communication towers to be subject to NEPA. The FCC has been implementing NEPA since 1974 when it stated that "Federal environmental laws require the Commission, as a licensing agency to consider independently the effects of its actions on the environment. . . ." The FCC also stated that "... it seems to us clear...that there are major actions taken by the Commission which can have significant environmental effect."

In 1986, the FCC altered and simplified its environmental rules and processes but continued to consider tower construction, registration, and licensing to be a federal undertaking/action. Later the FCC determined that the construction of interstate communications lines was "clearly a federal action triggering NEPA" and "the fact that a carrier's construction of facilities is authorized by rule rather than by action on an individual application does not eliminate the existence of federal action or affect our obligation to comply with NEPA and other federal environmental statutes." The FCC has a long history and court support and requirements to consider the licensing, registering, and building of towers to be a major federal action or federal undertaking under NEPA.

The current Rule Making asks us to reconsider whether tower licensing, construction, and registration is indeed a federal undertaking/action thereby making communication towers subject to NEPA. This idea is not consistent with existing legal precedents and is strongly opposed by ABC.

Rulings and decisions providing support that the construction, registering, and licensing of a communication tower is a federal undertaking or action:

42 U.S.C. § 4332(2)(C); National Environmental Policy Act Compliance for Proposed Tower Registrations, Effects of Communications Towers on Migratory Birds, WT Docket Nos. 08-61, 03-187, Order on Remand, 26 FCC Rcd 16700, 16702-03 (2011) ("Order on Remand") (includes *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989)).

47 C.F.R. 130 states that in 1995 the *Antenna Registration Order*, the FCC stated "registering a structure constitutes a 'federal action' or 'federal undertaking,' such that the imposition of environmental responsibilities on the structure owner is justified."

Matter of the Implementation of the National Environmental Policy Act, 49 FCC 2d 1313 (1974), para.46. The FCC listed “major” actions such as underground cable, satellite stations, and some communication towers. *Id* at para. 14. The consideration of major actions was maintained again in 1986 when the FCC changed and simplified the rules (In the matter of Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality.60 Rad Reg. 2d (1986)).

In *CTIA – The Wireless Association v. FCC*, 466 F.3d 105, 114-15 (D.C. Cir. 2006), the court supported the FCC that tower construction under a geographic area license requires federal approval, which supports the definition of undertaking. Hence the FCC maintained the ability and requirement to consider environmental compliance when towers were built. Court confirmed the FCC's conclusion that tower construction is a federal undertaking.

Streamlining the Commission’s Antenna Structure Clearance Procedure; Revision of Part 17 of the Commission’s Rules Concerning Construction, Marking, and Lighting of Antenna Structures, WT Docket No. 95-5, *Report and Order*, 11 FCC Rcd 4272, 4289 para. 41 (1995) (supported that that registering a tower is a major Federal action and invokes NEPA). *American Bird Conservancy v. FCC*, 516 F.3d 1027 (D.C. Cir. 2008).

Regarding the questions in the reasonable time period to act section, ABC urges that a 90 day timeframe be required locating all towers taller than 200 feet. Batches in the same local habitat would be acceptable to enable the public to assess likely cumulative impacts, but batches with multiple, widely disparate locations should not be allowed.

Regarding NEPA compliance, current rules require an Environmental Assessment if triggers on the EA checklist apply. Those without triggers proceed under a categorical exclusion.

Currently, towers 450 feet and taller require an EA to assess the potential impacts to migratory birds. We support continuation of this NEPA checklist process, and recommend that for migratory birds, the trigger height be changed from 450 feet to 350 feet to make it consistent with research that has found is the height where bird mortality from towers begins to greatly increase.

Similarly, communications towers are subject to the ESA. Critical habitat for endangered species is another important trigger that should be maintained. It is also important to note that it is through the NEPA process that endangered species considered.

As the FCC website notes:

The U.S. Fish and Wildlife Service (FWS), which administers the ESA, provides an [online mapping tool](#) to determine which species may need to be considered for proposed facilities. If a qualified biologist determines that proposed facilities may have an effect, a licensee or registrant must notify the FCC and file an environmental assessment. Applicants must submit a request for FWS concurrence with the Applicant’s effects determination. If the FWS determines that the proposed facility will affect protected species or habitats, Applicants must enter formal consultation with the

FWS. The FCC provides a [letter](#) designating applicants as non-federal representatives of the FCC for purposes of consultation with the FWS.

In addition, the NEPA checklist includes species proposed for listing as endangered species. The Greater Sage Grouse needs to be given special consideration during tower development over eight feet, because these species will avoid tall structures over time, with the tallest towers creating a habitat exclusion zone up to four miles in every direction. Priority sage grouse habitat on federal lands should be excluded from new tower developments and a four-mile buffer from the boundaries of priority habitat should be maintained from any new towers taller than 350 feet.

Thank you again for this opportunity to comment. To reiterate, American Bird Conservancy is opposed to any new rulemaking that would weaken existing environmental safeguards, or opportunities for public involvement in regard to the use of bird-safe lighting, or the siting of new towers. It is essential that progress to update lighting on tall towers to reduce mortality of migratory birds continue.

Sincerely,



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Resources

Federal Aviation Administration website for applying to change communication tower lights
– <https://oeaaa.faa.gov/oeaaa/external/portal.jsp>

Federal Communications Commission website for applying to change communication tower lights
– <http://wireless.fcc.gov/antenna/>

Federal Communications Commission website with individual communication tower contact information – <http://wireless2.fcc.gov/UlsApp/AsrSearch/asrRegistrationSearch.jsp>

[Evaluation of New Obstruction Lighting Techniques to Reduce Avian Fatalities](#). 2012. By James Patterson, Jr. (Federal Aviation Administration).

[The Federal Aviation Administration Advisory Circular for Marking and Lighting of Tall Structures](#) (AC 70/7460-1L) 2015.

Communication towers, lights, and birds: successful methods of reducing the frequency of avian collisions. 2009. Joelle Gehring et al.

The role of tower height and guy wires on avian collisions with communication towers. 2011. Joelle Gehring et al.

An Estimate of Avian Mortality at Communication Towers in the United States and Canada. 2012. Travis Longcore et al.